IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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THE HONORABLE A. HOWARD MATZ, JUDGE PRESIDING

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UNITED STATES OF AMERICA, PLAINTIFF,	)	
-v-	)	CASE NO. CR 99-123-AHM
BRUCE BELL, DEFENDANT.	)	

COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
MONDAY, OCTOBER 25, 1999

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OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
312 NORTH SPRING STREET, #430
LOS ANGELES, CALIFORNIA 90012

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MONDAY, OCTOBER 25, 1999; LOS ANGELES, CALIFORNIA

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THE CLERK: CR 99-123-AHM, U.S.A. versus Montez Day and Bruce Bell.

Appearances, counsel.

MR. BROWN: Good afternoon, Your Honor. Andrew Brown for the government.

THE COURT: Good afternoon, Mr. Brown.

MR. NEWMAN: Good afternoon, Your Honor. Brian Newman for Mr. Bell who is present in court.

MR. MAYOCK: Good afternoon, Your Honor. Michael Mayock on behalf of Montez Day who likewise is present.

THE COURT: Good afternoon to all four of you.

All right. We're here for the pronouncement of judgment and the sentence on both Mr. Day and Mr. Bell. I would like to do Mr. Bell first.

MR. NEWMAN: Your Honor, on behalf of Mr. Bell, HE has asked for a further continuance of today's sentencing. The reason for the continuance -- and we would ask that a short continuance of no more than a week -- is because of a flurry of last-minute responses to my arguments by the probation office which I didn't receive until late I believe Thursday, and also had not gotten the psychiatric report until Tuesday, I think it was Tuesday of last week, none of which Mr. Bell has had an opportunity to even see.

So we were talking about he would like the opportunity to see those reports and give me input considering the fact that I think the structural issue that we're going to be addressing, Your Honor, today is the core, whether Mr. Bell is actually a career offender or not. These differences in sentencing between whether he is or he isn't is very significant.

THE COURT: What does the psychiatric report then have to do with whether he's a career offender?

MR. NEWMAN: Well, that doesn't. He has not seen that report. And that is not the foundation for my request for a week continuance.

THE COURT: All right. Well, that's what you said though.

MR. NEWMAN: I'm sorry.

THE COURT: And I'm really not inclined to drag this out any further.

Mr. Brown.

MR. BROWN: Your Honor, I just wanted to object to the continuance. We had the change of plea on May 14th. It's been five-and-a-half months. The late filings have been caused by the defendant who filed his papers just days before the hearing putting great strain on the government, the court and the probation office in filing responses within 24 hours so that people would have them.

And if he wanted to be sentenced second today to give

him a chance to go over the probation officer's responses, the government wouldn't object to that. But the reply from the probation office to his papers, they are minuscule changes. They basically just reiterated their earlier position. So I don't see that there's some big new thing that he needs to read before the sentencing.

THE COURT: Okay. Well, I was just going to suggest that you give your -- and I'll go first with Mr. Bell, with Mr. Day. Sit down. You can do it at that table in the back so you're not distracted. You can show him these very skimpy items. They won't take long to review. You can explain them to him. They don't address what you tell me is going to be the principal focus of your argument anyway.

I have given both sides so many extensions and so many opportunities to build their case and I have too many other sentences on for next week to continue this again. So I'm going to deny that request.

MR. NEWMAN: I understand, Your Honor. But for the record, a lot of the continuance or extensions were because for some reason the Bureau of Prisons moved Mr. Bell to Oklahoma, if the court recalls, and it took a while to find him and to get him back.

THE COURT: Let me make it clear to both you and Mr. Bell, I'm not holding that against him in terms of your request now. I'm simply reflecting that this has gone on for a long

time. You've both had an opportunity to meet with other each and coordinate with each other. And I think you'll both have the full opportunity to be heard. So I'll take Mr. Day first, but that won't take all that long. So be efficient in showing this material to your client.

MR. NEWMAN: I will, Your Honor.

THE COURT: Don't tell me you're going to seek a continuance, Mr. Mayock.

MR. MAYOCK: Well, perhaps, Your Honor. There was a little bit of a miss in the communications. Apparently Mr. Brown had filed and FAXed a response to my position paper, which admittedly I didn't file until Wednesday of last week as your court stamp will indicate.

However, it will also indicate inside the attachment that it was at that time that I was getting a copy from the psychologist, a report, and I waited for that report. That was the basis for the delay waiting for that.

But in any event, going back to the issue, I did not receive a copy of the government's opposition. There was a FAX number that I had about four or five years ago. And apparently there was a FAX that was transmitted, that's happened in the past.

Unless Mr. Brown has that document showing the FAX number, it's a FAX of a firm that used to be on the same floor where I was and I didn't get it in any event.

THE COURT: When did you get it?

MR. MAYOCK: I just was able to read his in court today. And the problem that I have is this. Essentially my client has advised me and I saw nothing to contradict this that the early conviction, the first conviction was for powder cocaine, not crack cocaine.

And secondly, there was an objection to unsworn statements of the defendant. Now if there's going to be some allegation that his father was not arrested and actually convicted for murdering his mother, we can get court records if that's what the prosecution seems to want. But I don't think that that is essential. If that's the kind of record that they're looking for, we can definitely obtain that if we had a very brief continuance.

MR. BROWN: Two points, Your Honor. As far as the crack cocaine versus powder cocaine, that was an inference that I made from the quantity of the cocaine. I remembered reading it, but I went over the presentence report just before sitting down and I don't see it. So for all I know, it may well be powder cocaine and I'm willing to so stipulate for purposes of the sentencing.

And as to the second point, Your Honor, the government isn't contending that it didn't happen. The government is merely saying that they haven't carried their burden.

THE COURT: Okay. Well, there's no need for a

continuance in terms of what your concerns are, Mr. Mayock. I have not assumed that it was crack cocaine and the difference between whether it was crack or other cocaine is not going to be at all a factor in my, and hasn't been as I prepared for this sentencing.

In terms of the government's position relating to your client's childhood history, I have construed it the way Mr. Brown just described. I have assumed for purposes of my analysis that what apparently happened did happen, what you say happened happened. And that is to say that as horrific as it is, your client as a very young boy may have actually seen, but in any event, directly experienced the slaying of his mother by his father.

I think that there are other reasons why it's highly unlikely I would consider that as a basis for departure. It may be a basis and I think there may well be other bases to not impose the sentence at the high end of the guidelines as the probation recommended, at least as to your client. But what you think I might be inclined to misunderstand or not apply won't be a factor at all. So I want to go ahead with today's proceeding.

MR. MAYOCK: Fine, Your Honor. If that's the case, we're ready to proceed.

THE COURT: Okay. Then let's do so.

Now did you show to Mr. Day the government's very brief response?

MR. MAYOCK: No, I didn't. I just read it in court.

THE COURT: Well, I want you --

MR. MAYOCK: I have discussed some of the factors with him.

THE COURT: Mr. Day, do you feel that based upon what Mr. Mayock summarized to you after he this afternoon for the first time read the government's opposition to your position about sentencing, do you feel that you understand what the government's position is?

DEFENDANT DAY: Yes. Yes, Your Honor.

THE COURT: Okay. Then I don't think it's necessary even to take a short break for Mr. Day to read that. And it's pretty straightforward anyway. So we're going to proceed now and let me start by saying this. Obviously both sides have read the presentence report. So have I.

On Mr. Day's behalf, Mr. Mayock has made a number of points and I'm going to recite those and then give you an opportunity, Mr. Mayock, to supplement those by giving you a focus and that focus will be my response to it. The way to do this most efficiently and Mr. Newman, I want you to listen to what I'm saying because this is going to be applicable to your client as well.

After careful review of the way that the presentence report and the recommendation characterize the guideline range, I believe that there is a more precise way of stating it. And

this is the way it should be stated and this is the way I believe the range is as presented by the probation office.

Your client, Mr. Mayock, has pled guilty to all three counts. Mr. Bell pleaded only to Counts 2 and 3. As to Mr. Day, the guideline sentencing range really is between 188 and 235 months. Well, at least as to Mr. Bell it is. Let's take his to begin with. That's on Count 2. Plus an additional 84 months consecutive for Count 3. That means that the guideline range is 272 months at the downward end, at the low end, and 319 months at the high end.

For your client, Mr. Mayock, who is dealing with a guilty plea to all three counts, it comes out much the same, but the calculation is a little bit different. There is 60 months on Count 1 -- excuse me. There is a range on Count 2 of just what it is for Mr. Bell, between 188 months and 235 months. There is a range, not a range, but a consecutive sentence mandated on Count 3 of 84 months. Those two counts wind up being at the range of 272 months to 319 months and that's the range that I have calculated for purposes of figuring out what is the fair sentence for your client as well.

As to the first count, for Mr. Day I would like to ask our representative from the probation office whether that changes the range given that there's a third count.

THE PROBATION OFFICER: It does not change the guideline range; however, the sentencing mandatory maximum is 60

months. And then on that particular count your cap is 60 months.

THE COURT: Okay. So the range will be the same, Mr. Mayock.

MR. MAYOCK: Yes.

THE COURT: Now getting back then to the positions that you have asserted, Mr. Mayock, you believe that the criminal history is overstated. And essentially as I construe and understand your argument, it's because your client after appeal was sentenced to a 16-month sentence, had already served 27 months before the weapon component of the conviction was reversed and really was being sentenced for mere possession, not mere possession for sale. But the offense occurred when he was young and that to consider it to be a basis for career offender status is unfair and distorts what is in fact the true situation in terms of the prior criminal history.

Secondly, you have made an eloquent argument for a departure based on what you classify as post-traumatic stress syndrome and that gets us to the unique situation of the father's apparent slaying of the mother. And coupled with that, you point to a different classification arising out of the I think the same concept and the same facts and that's that he suffered extraordinary abuse as a child.

As to the criminal history factor, I think that I'm inclined to accept Mr. Brown's response to that. I think that

the circumstances of the offense and the nature of the drug that was being possessed unquestionably make it appropriate to serve as the basis for career offender status. I do want you to address that in light of what the government has said.

As to the request for departure, what most, what I find to be most noteworthy is that Dr. Maloney's report itself and he had two reports and I read them both, every word of both of them. He said that it couldn't be argued that these awful events caused Mr. Day to engage in, quote, "the illegal and problematical behavior." He said -- and this is also a quote -- "He certainly does not present with any significant symptoms of a major mental disturbance."

I went and looked at not only the provisions you've cited, but 5(k)(2.13) which is the guideline provision relating to diminished capacity. And then that speaks in terms of a significant impairment, significantly impaired ability to understand the wrongfulness of the behavior or to control the behavior that the defendant knows is wrongful. And neither component of what would be significantly reduced capacity has been established by Dr. Maloney's report.

So although I think there are considerations that militate in favor of not sentencing Mr. Day to the 319 months that the probation office recommended -- and I'll give you a chance to be heard about that too, Mr. Brown -- and although I acknowledge that under the Brown decision where the Ninth

Circuit clarified a misunderstanding that Judge Tevrizian had, I would have the discretion, if I thought it was warranted, to make a departure, I decline to do so tentatively.

I'll listen to both of you, you and your client. For the reasons that I have indicated, I don't think a departure is warranted under the evidence before me. It is presumptively discouraged. Disadvantaged upbringing and psychological trauma such as this are not presumptively the basis. I think that the guideline range as I have defined it and refined it is the range within which the sentence should be imposed.

So that's my attempt, Mr. Mayock, to give you guidance. You need to know, Mr. Day, that you have a right to speak to me. I have been addressing your lawyer inkind of technical terms and that's inevitable because that's what the guidelines require a judge to do. It's just the way they're structured. But I do want to hear from you. And with that I'll give the lawyers a chance to be heard now.

Go ahead, Mr. Mayock.

MR. MAYOCK: Thank you, Your Honor.

The first point that I would want to make, and I will focus these points on the departure, there are admittedly categories that have been set forth in the sentencing guidelines, particularly the 5(h)(1) sequence. The prosecution has said that family ties is not ordinarily a basis for departure and that under 5(h)(1.2) lack of guidance and a

disadvantaged upbringing is not relevant. They cite those and they also cite a lack of guidance case coming from another circuit involving a decision from the Second Circuit about --

THE COURT: A very recent decision.

MR. MAYOCK: Yes, but it's not from this circuit either. But it's a stepfather killing, being killed. It doesn't saying anything about whether it was in the presence of the defendant in that case who was apparently eight at the time. Also it was not a mother. Particularly important and instructive would be the fact that you have a mother who is murdered by her husband.

These are the parents of Mr. Day when he's approximately six years old. And as Dr. Maloney reports, that is a very crucial and important time in any child's life as far as what impact that is going to have on them. So I would say that even though Revera seems to talk about something that might be significant, it's not relevant.

We pointed out in our position paper Section 5(h)(1.3) as mental and emotional condition. And I analogize that to departures that had been made under the post-traumatic stress syndrome ground. And essentially as the court has recognized, that is under diminished capacity. Diminished capacity, as the court I'm sure is recognizing in looking at it, does not deal specifically or allow departures where you have a violent act taking place. But we're not asking in this case for any

departure based on that basis.

Rather, what we're asking for and it's specifically mentioned is a downward departure because of extraordinary abuse suffered by the defendant as a child. I would suggest that does not come within the compass of family ties. It does not come within the compass of lack of guidance either which the prosecutor cites. Instead we're talking about unchartered waters. I would talk about this in this way.

The Kuhn decision was decided in 1998 as this court is well aware. In Kuhn they said virtually any appropriate information relevant to a defendant's background, character or conduct could be presented to the court as a basis for a downward departure and the court's discretion was virtually unlimited. If those bases were presented in an unusual way, the court can depart downward.

My suggestion is that extraordinary abuse suffered as a child doesn't directly fall under mental or emotional condition, although that may be the closest. It doesn't fall under lack of guidance and it doesn't fall under family ties.

Instead I think we have to take a look at those sections, these 5(h) sections, and see when they were enacted. Those were enacted in 1991. If you look at Kuhn, that's a 1998 U.S. Supreme Court decision. Clearly the U.S. Supreme Court could recognize those and in essence gave authorization for a court to create and have a departure where something doesn't fit

neatly within the box. And clearly in this case we don't believe the box includes Mr. Day within the family ties or lack of guidance 5(h)(1) groupings.

Again I would point out, as the court is well aware, that the Ninth Circuit in the Brown case did consider severe childhood abuse and neglect and a psychologist's report about that childhood trauma as a basis for a downward departure. And again, forgetting about Brown for a moment but a more recent case, in United States versus Sanchez Rodriguez, the court authorized, an en banc decision, authorized a departure for a career offender along the base offense level where the predicate offense was a very small amount of drugs. So I'm trying to come around back to this point.

I think if we look at this entire situation based on what has happened to my client in his life, you see here's a person who, and I won't reiterate all the points that were made in the paper, who has had a very traumatic, a very difficult life, a life that no one would ever wish upon anyone else, any other human being.

And he falls within a scope that is not clearly covered by any of the guidelines and that's why Kuhn would apply. And that's why under these circumstances too the court could look under the authority of Sanchez Rodriguez for a downward departure.

Specifically we've pointed out in looking at this kind

of case the four building blocks of mental health, the first one being heredity. And here we've got an individual whose father was diagnosed as a paranoid schizophrenic. And I've been advised by his uncle, Arthur Day, that in the last couple of months he's attempted to commit suicide. This is the heredity that Mr. Day has.

The second building block is early nurturance. He didn't get that. His mother was murdered. He was shifted from place to place. And then his father came back when he was probably about nine or ten years old and then raised him based on voices that he heard directing him where to go and put him in incredibly difficult situations in gang infested areas, poor schools.

He's had numerous problems with early nurturance which he did not receive. His traumatic experiences are just overwhelming, start again with the murder and being reared by a paranoid schizophrenic father, clearly that's a traumatic life experience. And last, the quality of support system. He doesn't have that. It's clear he has nothing. He has on all four building blocks of mental health, he has fallen far, far short.

On TV the other night there was a program involving Mike Wallace. Mike Wallace talked about having depression and what effect it had on him. But you look at him and you look at other people like Tipper Gore who have had admitted problems

with chronic depression and you look at what they have as far as the quality of their support systems. And early nurturance and a lack of traumatic experiences -- I can't say anything about heredity -- but on those bases they're very different.

Even though they have mental problems, they don't have the problems with the whole, all four building blocks basically being shattered and falling down. That's why Mr. Day is very much different than other people who might come in and might make this sort of claim. On that basis I would respectfully submit to the court that there is a basis for a downward departure because of that and because of these circumstances which are particularly unusual.

Turning to the overstated criminal history. I think Your Honor hit the nail on the head. You said there were problems that he had in getting an extra 11 months after the case came back. He entered a guilty plea. Rather than remain in custody and go through another trial after serving 27 months, he did enter a plea.

Clearly the circumstances of that for an immediate release would be a justification for someone to think that the criminal history was over represented, particularly because he had those extra 11 months. He'd already served above and beyond the maximum that he could possibly get if he were convicted of a charge.

At the time he was an 18-year-old youth. It was a

possession only case of powder cocaine which was for personal use. On that basis I suggest respectfully that the court reconsider the criminal history as being over represented, particularly when you think of the circumstances under which someone at 18 would have the opportunity to go on with his life and the easiest thing to do would be to enter that plea and get released from jail instead of continuing on on the presumptive detention that, as the court is well aware, occurs in drug cases.

THE COURT: Are you basically saying that I should consider your client not have to been factually guilty, that he didn't commit the crime that he wound up pleading to because he pled given the circumstances you've now described?

MR. MAYOCK: Well, I'm saying that under the circumstances rather than go forward with the trial, the case was reversed and tainted parts were thrown out.

THE COURT: Right.

MR. MAYOCK: That was a clear motivating factor as to -- and I'm not saying he didn't enter a plea. He's never denied that he entered a plea. But when you look behind the motive for entering that plea, to be released, particularly when you've got a young man who committed this offense at age 18. He's definitely not going to be as thoughtful as someone with more life experiences, particularly more beneficial life experiences than Mr. Day has had in his life, that that's a

basis for saying over representation or overstating the criminal history occurred. And if that's the case, I have suggested in our papers that the court consider looking at this as a non-criminal history, a non- --

THE COURT: Non-career offender.

MR. MAYOCK: -- non-career offender case and look at the offense level and consider what the offense level would have been just considering all these factors, and we came up with a calculation if the court did that it would be a guideline range -- and this is a criminal history offense level of 27 that was calculated by the probation officer -- would come out to be, if the court made his criminal history category 4 instead of 5, because it was just on the border of 5, 100 to 125 months plus 84 months which would give a sentencing range of 184 to 209 months.

Clearly that's a very, very substantial sentence. We're not talking about anything that's inconsequential in any way. That's an awful lot of time and it's a time that would give my client the opportunity, we hope as Dr. Maloney hopes, to receive the kind of counseling that he didn't receive early in life and which he clearly needs and which Dr. Maloney who is a clinical psychologist at the USC Medical School recognizes and I would ask that the court impose that sort of a sentence.

THE COURT: Okay. Now a couple of questions. In terms of counseling, I can make a recommendation and it will either

become available or not regardless of which alternative proposal I adopt, right?

MR. MAYOCK: That's true, Your Honor. The Bureau of Prisons has its own authority to do what it wants often.

THE COURT: And I hope he does get the benefit of counseling if he needs it and I'll say so when I pronounce the judgment.

Secondly, why don't you address what has been very troubling to me which is the circumstances of the flight. Your client was the driver. We could be sitting here, but for the grace of God, with dead victims out there given that incredibly reckless conduct that he displayed in trying to get away from arrest.

I know what your arguments are and you've made them very, very eloquently and that's not just trying to pat you on the back. You've really done a good job. But you haven't said anything about that and any judge sitting up here is going to be greatly troubled, at least I'm greatly troubled by that.

MR. MAYOCK: I thought that the court might be asking a question like that. I directed that specific question to my client earlier to ask him what happened. And that's one of the reasons why the post-traumatic stress analogy and argument was made. What happens to somebody who has mental problems of this kind and has experienced this kind of life is they just react. They don't sit and contemplate. They in a stressful situation

find that they are acting in ways that a normal person wouldn't act. That's what that entire stress syndrome is all about is that kind of behavior.

What he did was he did drive, although there were a couple of parts of the report that are inaccurate. Initially he did not drive the van away, the vehicle away from the bank. They got in a second vehicle and he was driving that vehicle. That vehicle ended up being chased. There were --

THE COURT: Don't go into what happened during the chase because it's just going to upset me all over again. I know how dangerous it was.

MR. MAYOCK: The police were following. I think there was a helicopter or two as well. He pulled into a mall and just stopped where the police came up. He was the only one who remained in the car. He didn't try to run at that point.

He has expressed to me that the concern he had was that he was going to be shot and he felt that if he went to a mall, that by being there where there were a lot of people, he wouldn't get shot by the police.

I'm not saying this is clear thinking because clearly it's not. But it is stressful thinking and it's the kind of thinking that a person who has had the kind of upbringing that my client has maybe engages in. That's the explanation he's given me about why he stopped there and why he just sat in the car and didn't make any effort to take his hands off the

steering wheel. He just brought the car to a stop and made no further effort to run away.

THE COURT: I would like to hear from Mr. Brown before I give Mr. Day a chance to speak with me. That way you can at least have in mind whatever it is the prosecution is going to say, Mr. Day.

MR. Brown.

MR. BROWN: Thank you, Your Honor.

First, I have a different explanation for arriving at the mall and that's when you're being chased by a helicopter, you don't really have a lot of options to evade the police on the ground. Really the only way you're going to be able to get away from them is if you can be someplace where a helicopter can't see you such as inside an enclosed building.

There really isn't a better way to flee in hot pursuit than if you can blend in with the crowd. And the fact that he did not continue to flee after he stopped the car, I attribute to the fact that the police were right on him and he didn't have an opportunity and that his co-conspirator who was not driving and was therefore able to leave the car more quickly only got a few feet before being captured by the police.

THE COURT: Mr. Brown, what I would find most productive in terms of your response is the issue of whether he he's a career offender and how to deal with that first conviction for the cocaine.

MR. BROWN: Okay. Well, Your Honor, he pled guilty to possession of cocaine with the intent to distribute which is clearly a predicate felony under the guidelines. And the offense was actually a very serious one. There were three separate firearms found in the house in which he was hiding.

THE COURT: But in the end, he wasn't convicted of anything related to those firearms; is that correct?

MR. BROWN: No. His conviction for possession of a firearm during the drug trafficking crime was reversed on appeal. But it's not necessary that he be convicted of a firearms offense in order for the conviction to count as a predicate felony.

And here it's the defendant's burden to prove that his criminal history is overstated. And all the defendant has said is well, he may have had a reason to plead to an offense that he didn't in fact commit. The defendant certainly hasn't said that. There's certainly no evidence. This is merely a lawyer's speculation as to what happened.

All we know for a fact is that he pled guilty to a drug trafficking offense. Not only that, but there were very serious circumstances surrounding it, including the shooting of a police officer. So I don't think that there's any way to get around, even if Your Honor was inclined to go there, the defendant certainly has not carried his burden. There's nothing that indicates that the count of conviction is an accurate one.

Moreover, I think that the history of the defendant shows that a departure on criminal history access would be inappropriate because of the danger he poses to the community, which I think is the most serious factor warranting a sentence at the high end. The defendant has numerous involvements with firearms. In Paragraphs 59, 66, 73 and 84 there's all the defendant involved with firearms.

Let's just take one of those, for instance Paragraph 84, where he was not actually charged with this. He was arrested for being a felon in possession of a firearm in January of 1994. Your Honor, that was just months before he then got convicted of armed bank robbery where he had a pistol that the teller saw tucked into his belt. And now, Your Honor, he gets out of prison in mid-1998 and then in the beginning of 1999 he's again arrested for armed bank robbery. This time two defendants, two firearms. I think with his history of involvement in firearms, the court should decline any departure in the court's discretion because he's simply a danger to the community.

Whether he's going to kill somebody for recklessly fleeing from a crime or whether he's going to kill somebody with the firearms that he uses time and again is immaterial. The fact of the matter is, he's an extremely dangerous man. He's had two opportunities to turn his life around in prison and each time all he's done is get involved in ever-escalating crimes in

terms of their seriousness.

THE COURT: Just for the sake of analytical precision, do you construe Mr. Mayock's arguments relating to the career offender status as a request for a departure?

MR. BROWN: That is how I understood it, Your Honor.

THE COURT: Okay. I understood it slightly differently as a request for a correction in terms of the calculation. Which did you intend it to be, Mr. Mayock?

MR. MAYOCK: As a departure. That's why I was citing the Sanchez Rodriguez case.

THE COURT: Okay. Anything further, Mr. Brown?

MR. BROWN: No, Your Honor.

THE COURT: Okay. Thank you.

Mr. Day, would you like to say anything to me? You have a right to do it and sometimes it's very helpful to a judge. So feel free to do it if you choose.

THE DEFENDANT: Your Honor, I'm not going to try to make excuses for what I've done wrong. I admit to what I did wrong in this case and in the last bank robbery.

I pled guilty to unarmed bank robbery which I did commit. And I went to trial and the jury found me guilty of not having a gun because -- not because they just didn't believe, because they believed me, but they found me not guilty of not having a gun because I didn't have one and because the people had doubt.

They wasn't sure where I brought my bag from. They couldn't say. They said I had a bag with blue and brown writing on the bag and they said the gun was blue and brown. When they asked where was that, where did I get it, they didn't even know. Well, we don't know, he just had it in his hand; one minute he did, one minute he didn't.

But I didn't have a gun. That's what I pled guilty immediately. When my lawyer told me, I said I'll plead guilty to the robbery. I did it. I was desperate and in the act of impulse I went into Wells Fargo. I banked at Wells Fargo. I had about $12 in my account. My wife was -- my fiancee was pregnant. The rent was due. I walked into there and I said give me the money. I did that. That was just stupidity and it was done -- it was just stupidity.

The first criminal case that I have, the possession with intent to distribute powder cocaine, I was visiting a friend's house. I was in the back room where there was no guns with a lady. There was no drugs found in that room. The guy who shot the police was in a totally different room with the gun that belonged to his girlfriend. Okay?

The cocaine that they found was found in a can inside of a bathroom. There was no evidence in the whole trial against me being a drug dealer of any sort in there. There was nobody said that I sold drugs. It was they were saying that the guy that lived there sold the drugs.

I was visiting, the girl that was with me was visiting that house. And the Appeals Court overturned the case because of the lack of evidence in the trial, not just because of the judge's ruling in the argument, but because of a lack of evidence also. And I pled guilty because they told me I was going to go home. When they said you plead guilty you go home tomorrow. I mean, I've already been in prison two years, over two years. I pled guilty. I didn't know that this would do this to me later.

This case right here, this was stupidity. I mean, this was just -- I don't know why. I don't know where the impulse, why I just allowed myself to do something this stupid. Running from the police, I was scared. The police was pulling guns out on us. Every time we turned a corner they were coming out their cars pointing guns. We were ducking. I didn't want to get shot.

There was no guns in the car when the police finally caught up to us. And I ran because I did not want to get shot. I did not want them to shoot us because I know they're coming because of the armed bank robbery. I don't want them to shoot me. I'm trying to get away. I don't want no guns in the car.

I don't want to get killed. I don't want to get killed. I pulled into the parking lot because I know there's a lot of cars there, there's a lot of people there. I'm hoping they're not going to open fire. I didn't jump out of the car

because I don't want to get killed.

THE COURT: A couple of people got hit by the car, didn't they?

THE DEFENDANT: I had an accident in the intersection. A light turned red on me and I was going so fast I slid on the brakes. I couldn't stop and I wish I could apologize to the person.

THE COURT: You hit one car and that car hit a second car, right?

THE DEFENDANT: Yes. I hit the back of a burgundy, dark burgundy mini van. I remember it clear as day. And that car slid and hit the front of another car that was turning right, making a right-hand corner. I mean I stopped for a second and all I could think about was the police was going to shoot me. So I proceeded on.

I didn't get out -- I wasn't trying to run from them as far as -- I knew I couldn't get away from no helicopter. I know once the helicopter's on you, you're going to jail. But I didn't want them to shoot me and I kept driving around looking for somewhere where it was populated that I could go to to keep them from killing me. That's all I could think of. I didn't want them to shoot me and kill me.

I mean, I can't ask -- I'm not asking, Your Honor, I'm not asking you give me leniency because I didn't do anything wrong or because I don't deserve to be punished. I agree. I

accept the fact that I deserve to be punished. I pled guilty with no plea agreement, not because I was going to get a benefit. I didn't get a benefit from the plea. I pled guilty because I know I was guilty. There was no benefit offered to me. No deal. There was no deal. I pled guilty because I know I was guilty. I know I was caught dead bang doing what I was doing.

As far as my childhood, Your Honor, that's something that I don't normally discuss. I don't normally even tell people. I have friends that's known me for years that don't know my father killed my mother. And they don't know because that's something that I don't talk about and I don't think is any of their business.

I didn't tell none -- I never told anybody about it until -- I didn't tell -- my fiancee told my lawyer the last time I had a case when my lawyer talked about the issue. I just didn't want to push the issue because it's something that I have been dealing with all my life. And I have never known how to deal with it. It's not something that -- I mean, it's just something I've never known how to deal with it.

I'm asking for leniency not because I want to go home. Because I don't feel that I deserve that much time. Because I didn't make -- the mistakes that I made, a lot of it was made out of impulses. The robbery of the bank was pure impulse. I was visiting a friend which bad company brings about problems, I

agree. And this robbery right here was a stupid mistake. But I know maybe one day I'll have the opportunity, I don't know.

Maybe I could write a letter and apologize to the people in the car. I would like to apologize to the people in the bank because I know they were scared. Even the teller in the bank, I told -- not the teller, but the security guard, he had his hands up. I said put your hands down, man, I'm not going to do anything to you, man. Because I had no intentions of physically hurting anybody. I needed some money.

My father after the FBI went and talked to my father, they got my father attempting suicide. My family had to move him back out of town. And now I'm going through more. I've got more pain from my personal life than I do about being in jail.

THE COURT: Well, I understand the impact of that and I also understand as best as somebody who is a total stranger to you can from a very different perspective why the trauma of your childhood or at least the experience of your childhood is not something you quickly or routinely talk about. I really hear you on that.

Is there anything further that you think I need to know?

THE DEFENDANT: I mean, I think you have more than enough in front of you to take your judgment, Your Honor. I would just like to apologize to those that I've hurt. I mean, the people inside the bank and the people that I ran into their

cars and the person that was involved in it and the trauma that I brought upon them.

As I started to say about post-traumatic stress disorder, I realize the trauma that I put people in by the things that I've done. And I just hope that it doesn't affect them like it's affected me. And there's nothing else I have to say, Your Honor. Thank you for your time.

THE COURT: All right. I find that the guideline range is what I stated. The low end would be 272 and the high end would be 319, taking into account the mandatory consecutive 84 months on Count 3. I am not going to depart of either of the bases that Mr. Day or his lawyer ask for and here's why.

As to whether or not the prior criminal record overstates the seriousness of Mr. Day's offenses or distorts his criminal profile, I think that the real question at its core is what kind of risk to society does the prior history suggest should be a factor for classification and for purposes of sentencing. And I don't think that Mr. Day's history can be looked at only in terms of the possession with intent to distribute offense and the current charge before me and the prior bank robbery before that.

There is a pattern of criminal behavior. It's reflected in the probation report only in part in the sections that Mr. Brown pointed to. I think that the fact that he was 18 when the cocaine offense occurred is a factor that affects where

I come out on the guidelines. I find that the particular details of this offense and the explanation that Mr. Day just gave me for what happened during the attempted flight reflect a couple of factors that actually incline me not to depart.

Mr. Day's own statements are understandable. Not wanting to be shot is a basic and very survival instinct that we all, almost all of us have. But the choice that he made to attempt to protect himself was made at the expense of society and I'm afraid that that would be the choice he would make in comparable circumstances in the future until and unless he can get either the counseling or the treatment or the self insight that would enable him to balance his interests as he perceives them, his fears as he feels them with the interest and the fears and the needs and the rights of other people, particularly other innocent people.

So while I would have the discretion to accept Mr. Mayock's requested departure on the seriousness of the offense and whether or not Mr. Day should be classified as a career offender, I decline to do so.

With respect to the impact of what happened when Mr. Day was five or six, it's astonishing that someone could be as strong as you appear to be, Mr. Day. I don't want you to think I'm holding that against you. But in fact, I admire that you can stand before me and speak to me in a really unusually articulate way. You can deal with something in public that

slices anybody to the bone and that you can be capable of alternative behavior in light of that.

The information that Mr. Mayock attempted to get and that in fact was provided by the doctor doesn't support the factors that Mr. Mayock pointed to. He has done what a good lawyer should try to do and that is develop a basis for a departure that isn't focused on any particular ground but combines all of them and would make the whole greater than the sum of its parts.

I don't say that to demean your argument, Mr. Mayock. But that's the way I think it comes over. And I'm trying to look at the whole here. And the whole that I see is somebody who had other alternatives, even -- what I understand from the probation reports -- in terms of the Seventh Day Adventist suffering that you were exposed to, the several years of non-criminal, non-violent, non-suicidal behavior on the part of your father, you had opportunities, that you didn't have the opportunities that many other people in society have, that I may have had is unfortunate, but it doesn't require or authorize a judge to say I'm going to depart downward from these factors.

And for those reasons and even given the recognition that I'm now reflecting that I could do it, I decline to do it. But I'm not going to sentence you to the 319 months. I don't think that that would be appropriate for a number of reasons. And those reasons need to be expressed because the range of the

guidelines here is in excess of 24 months.

Unlike Mr. Bell, Mr. Day is a younger man. There's an opportunity that if the message is correct and if it's calibrated, if I came out with something that is appropriate and you may not be ever in agreement with that either today, tomorrow or ten years from now. But what I'm trying to do is reflect the seriousness of your conduct to the potential for you to do better.

To simply and routinely give you what I'm authorized to because of what you did, which is incredibly serious and not just an isolated event, I think would be a mistake. I think that you need to be given a hope and I'm trying to give you the basis to hope that there is some opportunity, particularly at your relatively young age. You'll be in jail no matter whether I bought and accepted every argument that Mr. Mayock made. The term would be lengthy even at that classification.

I haven't accepted his argument. But I don't want you to think that I'm putting you in the same boat as Mr. Bell or that I would just take all of the significant and very compelling circumstances and say this is a bad guy, I'll give him the highest end of the range I'm authorized to consider. That is what I'm not going to do. So that's the reason for the sentence that I'm now about to impose and here is the sentence.

Pursuant to Section 5E1.2, Subsection A of the guidelines -- Mr. Brown?

MR. BROWN: Yes, Your Honor. I apologize if I missed this, but I don't believe Your Honor has inquired whether the defendant and defense counsel reviewed and discussed the presentence report as is required under Rule 32(c)(3)(A). I also don't whether -- I don't believe Your Honor has adopted the findings of the presentence report.

THE COURT: Well, I will get to the findings in a minute. I have not adopted the findings in terms of the way the range has been reflected. I don't understand exactly what the basis is for a potential life sentence. Neither lawyer has addressed that. I've looked into that and I'm aware of at least one decision, a Ninth Circuit decision, that says in essence if there is a mandatory minimum and no max, a life sentence can be implied as the max.

But that's under 924 Subsection E, not under 924(c). So I don't know what the basis is for considering that there was a potential upward range of a life sentence here. For that reason I'm not accepting their findings. But as reflected and corrected, and I thought I did this adequately at the beginning, I accept their findings and their calculations.

In terms of the review of the report, I thought we had gone over that. Mr. Mayock and Mr. Day, you have had a chance to review the presentence report; is that correct?

MR. MAYOCK: It is, Your Honor.

THE COURT: And you and at least the government's

response to your opposition, correct?

MR. MAYOCK: Yes, Your Honor.

THE COURT: Is there any basis that you can think of procedurally why it is not timely for me to impose sentence?

MR. MAYOCK: No, Your Honor, no legal cause.

THE COURT: Okay. Pursuant to Section 5E1.2 of the guidelines, all fines are waived because I find that Mr. Day does not have the ability to pay a fine. It is ordered that the defendant shall pay to the United States a special assessment of $300 which is due immediately to the clerk of the court.

Pursuant to the Sentencing Reform Act of 1984 it is the judgment of the court that the defendant Mr. Montez Day is hereby committed on Counts 1, 2 and 3 of the indictment to the custody of the Bureau of Prisons to be imprisoned for a term of 288 months. That is 24 years. This term consists of -- I have to break this down. A combined -- Mr. Brown?

MR. BROWN: No, Your Honor. I was just going to break it down.

THE COURT: How were you going to break it down?

MR. BROWN: 60 months on Count 1 to be run concurrently with 204 months on Count 2, followed by a mandatory consecutive term of 84 months.

THE COURT: Yes. Well, that's what I had scoped out and that's the basis for the calculation of 288.

Upon release from imprisonment, Mr. Day shall be placed

on supervised release for a term of five years. This term consists of three years on Count 1 and five years on Counts 2 and 3, with all those terms to be served concurrently and under these conditions and terms.

First, Mr. Day shall comply with the rules and regulations of the U.S. Probation Office and General Order 318. Second, he shall participate in outpatient substance abuse treatment and submit to drug and alcohol testing as instructed by the probation officer. Mr. Day shall abstain from using elicit drugs, alcohol and abusing prescription medications during the period of supervision. During the period of community supervision the defendant shall pay a special assessment in accordance with this judgment's orders pertaining to such payment.

The defendant shall participate in a psychological psychiatric counseling or treatment program as approved and directed by the probation office. And the defendant shall not obtain or possess any driver's license, social security number, birth certificate, passport or any other form of identification without the prior written approval of the probation officer. And he shall not use for any purpose or in any manner any name other than his true legal name.

Now you have a right to appeal this sentence, Mr. Day. And if you do so, you need to do so within ten days from today. Please speak to Mr. Mayock who will give you all of the

information you need on how to prosecute an appeal from the sentence that I've now imposed. And if you are in doubt and need to know this, if you cannot afford to have Mr. Mayock represent you on appeal, he will continue to be appointed at no cost to you.

Now there are no counts to dismiss; is that right, Mr. Brown?

MR. BROWN: That's right, Your Honor.

THE COURT: Okay. Is there anything further that needs to be addressed?

MR. MAYOCK: Yes, Your Honor. I believe you said that with respect to the supervised release each of the terms were to run concurrently. But I don't know if you said that with respect to the 60-month, 204-month and 84-month sentence. Those are consecutive or concurrent?

THE COURT: Well, the 84 months is consecutive.

MR. MAYOCK: The 60 then is a concurrent sentence; is that correct? I just wanted to make sure because otherwise the Bureau of Prisons will run every sentence, if there's no record, it runs consecutively.

THE COURT: I'm not sure how to --

MR. BROWN: Count 1, the 60-month term, runs concurrent with Count 2, the 204-month term.

THE COURT: And that's what my findings were.

MR. MAYOCK: And then the 84-month term for the 924(C)

is consecutive.

THE COURT: Right. All right. Thank you.

MR. MAYOCK: Thank you, Your Honor.

THE COURT: Now let's turn to Mr. Bell, please.

Okay. Mr. Bell and Mr. Newman, have you had a chance to review what you needed to?

MR. NEWMAN: We have, Your Honor.

THE COURT: Can you think of any reason why I should not impose the sentence?

MR. NEWMAN: No, Your Honor.

THE COURT: Okay. Did you understand -- did you listen to and understand what I said concerning the way I believe that the calculations need to be articulated?

MR. NEWMAN: Yes, Your Honor.

THE COURT: Okay. Now I would like to proceed much as I did with Mr. Day and that is to give you, Mr. Newman, a chance to understand what my take is on your arguments. Then you can address those in your oral arguments. Your client will be given an opportunity also.

You have seen, Mr. Newman, that to the extent you are objecting to the references in the presentence report concerning the uncharged bank robberies, those have been modified and changed. And I want you to know I truly have not taken those into account.

MR. NEWMAN: I understand.

THE COURT: I don't have basis to consider that your client committed those robberies and I don't think that he should be treated that way and I haven't treated him that way in my provisional thinking. So I want you to be clear about that.

To the extent that much of your position is based upon Mr. Bell's designation as a career offender, it is that he was not serving a sentence within the 15-year period that is the outer scope. I think that the government's assessment of what really happened, and it may be the probation officer's assessment is correct too, he began serving a sentence on August 6th, 1981. That was aggregated. It was 30-plus year sentence.

The fact that he has chosen not to return from the day of release was built into the sentence. It was basically for the unauthorized escape. And had he not escaped, he'd have been in custody past the start date which is January 29th in 1984.

I believe that the calculation is correct. I believe that the reasons for the calculation make sense in this particular case. I am not inclined to adopt your contention that he should not be classified as a career offender.

You have also moved for a downward departure because your client didn't wield a semi-automatic weapon, but instead a .38 caliber weapon. I have no difficulty whatsoever in rejecting that basis for a departure. Just because there's no basis for departing upward under 5K2.17 doesn't mean and doesn't justify flipping that concept and granting your client a

downward departure.

As to the relatively recent issue concerning his mental status and his capacity, I have looked at Dr. St. John's report and the diagnosis is what I think I'm required to pay most attention to. The diagnosis is that Mr. Bell had borderline intellectual functioning.

But the report itself makes it clear that while immature, your client was capable of distinguishing right from wrong and I don't find any basis, none, in the evidence before me to suggest that the classification or the diagnosis that your expert has come up with of being borderline intellectual, being in the borderline intellectual functioning status warrants any special consideration given the nature of this conduct. So those are my initial reactions to the contentions that you have asserted in response to the presentence report.

So that this transcript can stand alone and the Court of Appeals can have a basis to evaluate from where I'm coming from and how I've approached this sentencing, let me reiterate what I said earlier this afternoon as to the co-defendant Mr. Day. I think that the correct way of assessing the guidelines, and your client is being sentenced only on Counts 2 and 3, is that the range for Count 2 is 188 months to 235 months. Count 3 brings a mandatory consecutive period of 84 months. So correctly stated the range would really be 272 months to 319 months.

And in a moment I will listen very carefully to what you say and anything that Mr. Bell may choose to say. I am inclined to sentence him at the upward level of 319 months. With that as guidance, feel free to address it.

MR. NEWMAN: Thank you, Your Honor. We'll start first with the career offender issue and that is that the basis of the probation department's calculation as to what transpired with the court subsequent to his recapture from the 1975 bank robbery is based on records from the Bureau of Prisons that were received from Metropolitan Detention Center because the records were so old that that's where the probation officer went.

My client insists that the fact that the cut-off date that he was sentenced to ten years on the bank robbery and that that sentence had been terminated and that the second sentence of 25 years on the second bank robbery was started after the date of the, the break-off date.

THE COURT: If you can be precise and give me months, dates and years, I'll be able to follow you better.

MR. NEWMAN: Yes. The date of -- let me get my paper here.

THE COURT: Maybe you should look at Paragraphs 88 and 89.

MR. NEWMAN: Yes, Your Honor. That's what I was just trying to find.

Mr. Bell was sentenced and was received at Lompoc on

January 16th, 1976 concerning the 1975 bank robbery; that he continued serving that sentence until he was released on I believe March 13th, 1981. At that time Mr. Bell was released on a day pass and was then classified as an escapee. And I should note that this paragraph and the subsequent paragraph are all taken from the Bureau of Prisons records and not from the court's records.

THE COURT: Do you have conflicting information from these?

MR. NEWMAN: No, I don't, Your Honor, because the records are so old. And I think that's why the probation department usually tries to use court records, but in this case was unable to which in and of itself makes the accuracy of this information somewhat, somewhat -- I don't want to say unreliable is probably too harsh a word -- but let's put it questionable.

THE COURT: Okay. Keep going.

MR. NEWMAN: That Mr. Bell was arrested on April the 28th of 1981 for the second bank robbery. Now that bank robbery I should note, Your Honor, is not an issue as to being a predicate offense. And as to what Mr. Bell states, is that the sentence that he received for that conviction on July 8th, 1981, he received consecutive sentences from the first bank robbery to which he had previously been sentenced to.

So that by the time we get to I think it's July of 1984 wherein we're within the 15 years for the predicate first

offense for a career offender, that sentence had already been served and at that time he was serving the subsequent sentence for the 1981 bank robbery. Therefore, the 1975 bank robbery would not be a predicate offense for career offender status.

THE COURT: Well, if you'll look at Paragraph 87, it says he was sentenced in Docket 81-000583, escaped -- five years' imprisonment concurrent to Count 1 in a different docket. I'm trying to figure out what that different docket was.

MR. NEWMAN: I would assume the different docket would have been the 1975 bank robbery.

THE COURT: Yes, but that's not what -- it's a different docket number. The docket number for the '75 robbery's in Paragraph 84. Then you get to Paragraph 87 and it refers to a different docket number, 497. I don't understand why they do it this way. It would be so much easier to say the 1975 Crocker robbery and the 1981 Great Western robbery. It would be much easier -- I'm just saying this for the sake of communicating. It is so hard for a court to be as conscientious as we try to be.

Anyway, what's your point?

MR. NEWMAN: So the point is is if the 19, if he had completed his sentence for the 1975 bank robbery prior to July 1984, that would have been outside the 15-year requirement for a predicate offense and he would not be a career offender.

THE COURT: I think that's analytically sound. That's

correct. But what about the "if," what makes you say that he did complete it?

MR. NEWMAN: Well, Your Honor, the records are, I believe are questionable at best. They're confusing as written here as Your Honor just noticed. And the numbers don't really, I should say the case numbers, docket numbers do not jive and I think that that's evidence of the fact that it was an old case that the records are not readily available.

The Bureau of Prisons in maintaining their records, I'm not sure how complete they are or whether they're summarized. They don't generally have the first information. They do now, but in those days it was different. And whether they just had case summaries, that would make the efforts of the probation officer who I believe is conscientious and well meaning, make it inaccurate or tend to be inaccurate or unclear. And certainly if it's unclear, then the benefit of the doubt should go to the defendant.

THE COURT: Okay.

MR. NEWMAN: The second other matter that Your Honor addressed with regard to why the court would not do sort of an about face because no --

THE COURT: I just want to help you out because if you look at Paragraph 95, that's what seems to describe the nature of the sentence that was imposed on July 8th of '81. That supports the government's contention that the sentence for

No. 75-1734 which is the Crocker Bank 1975 holdup, was part of an aggregated sentence.

MR. NEWMAN: But this was all taken from MDC records and not from court files or judgment commitment orders.

THE COURT: Okay. But if I were to find or required to find that this evidence is reliable, what does that do to your argument?

MR. NEWMAN: Well, certainly if the sentences are merged or are combined, then it appears that he would be a career offender.

THE COURT: Okay.

MR. NEWMAN: I mean, I've got to be honest.

The other issue that Your Honor addressed with regard to a requested downward departure based on the fact that he was not armed with an automatic weapon, there is some case law to support the fact, and we did cite some in our papers, that some courts have taken the discretion and downward departed because of the lack of using an automatic weapon.

Those cases have said that in a -- if you look at the types of cases that where people are armed, that the typical armed robber is armed with an automatic weapon as opposed to a revolver and, therefore, some courts have elected to, because of the ability of course of an automatic weapon to facilitate more damage.

THE COURT: This weapon was plenty lethal enough. I

really don't think you should press that argument because I find it to be utterly unpersuasive.

MR. NEWMAN: I understand, Your Honor.

The next issue Your Honor did not address in the summary that I did raise in my paper, two other issues, where the probation officer has increased his sentence or his range. One is concerning the escape and the probation officer increased his level by two levels pursuant to 2(b)(3.1)(B)(3)(a) of that being, you know, a danger to the public. I think as the court noted in the previous sentence --

THE COURT: Wait a minute. Are you talking about whether there was an increment for reckless endangerment?

MR. NEWMAN: Reckless endangerment, that's correct, Your Honor.

THE COURT: I don't think you're correct. I think the probation office did not tack on two points for that.

MR. NEWMAN: I'm looking at Paragraph 36, Your Honor, Page 8. And it certainly indicates a two-level increase.

THE COURT: Yes, but that's for physical restraint. That's for what happened inside the bank. That's not for what happened on the attempted flight.

MR. NEWMAN: Well, my understanding was the -- let's see. Well, the following Paragraph 38 referred to a two-level for the physically restrained.

THE COURT: No. I think what you need to appreciate,

Mr. Newman, is that the probation officer's calculation, which I think is correct, is that you add on two points for the restraint of the tellers and the bank manager. That occurred inside the premises of the bank. The probation officer was very explicit in saying that as to what happened in the cars afterward really is attributable to the co-defendant. And I took that into account in assessing the co-defendant's arguments. So Mr. Day, but not Mr. Bell, was assessed for reckless endangerment after the flight.

MR. NEWMAN: Well, my interpretation of those paragraphs, Your Honor, was in Paragraph 37 -- I'm sorry, 36, 37, 38 in that she increased Paragraph 36 two levels.

THE COURT: Look at 40 and look at the top of Page 9 and you'll see zero, a big zero. This enhancement has not been applied to Bell. It can't be any clearer. On top of Page 9.

MR. NEWMAN: I see where it is, Your Honor. But I also see where -- I'm adding the points here. That she increased by eight levels.

THE COURT: Two for property being taken, two for bodily injury out of the collision, two for physical restraint in the bank, two for the loss. That's 8 plus 20 which is the base offense level. That would get to the 28. That's your 28. If there were no career offender status, their reduction, the three points for acceptance of responsibility and you would get to the 25 that you're advocating.

MR. NEWMAN: Well, then it was my understanding in reading this, Your Honor, in that my interpretation was that she had increased it for physical restraint of the manager in the branch which we argued against and the reckless endangerment which we believe that Mr. Bell should not be --

THE COURT: I think you are not correct on that point, Mr. Newman. The reckless endangerment has not been applied to this.

Is that correct, Mr. Brown?

MR. BROWN: It is, Your Honor.

THE COURT: Okay. So why don't you move on beyond that.

MR. NEWMAN: Okay. Going with Dr. St. Martin's report, Your Honor, yes, Mr. Bell was considered of low intellectual function and being immature, if you want to talk about someone being immature at 47 years old. But what we have here is someone who has had extreme difficulty functioning and that for a short period of time he was able to beat a long history of drug abuse and that we can say that this offense was not predicated by his drug abuse, but predicated on the need for his loss of his job, that he had no income and that, as was stated earlier, it was virtually a spontaneous decision to do this.

And that Mr. Bell as a disjunctive argument to the downward departure for the psychological impact or immaturity of Mr. Bell, we ask that the court in the alternative mitigate that

because of his mental state, his low intellect would mitigate some of the aggravating factors in the sentence.

Mr. Bell has been very vocal in his claim that he never threatened to kidnap the manager, that he did push her away from the door. He did not pull her by the hair. That it was a violent robbery. He's not minimizing what he's done. But if Your Honor sentences him as the court indicated, he will be in his late seventies or eighties by the time he is released.

We are asking for a sentence in the low to mid-range of the guideline range. The sentence that Your Honor meted out to the co-defendant, 24 years, even if you sentenced Mr. Bell to that sentence would put him into the upper sixties or seventies by the time he would be released, certainly over any age of the ability to commit any further offenses.

Mr. Bell has shown that for a period of time he was able to function lawfully in society until some, until he lost his job and he lost his job through no fault of his own or even the employer. But he was injured on the job and therefore was unable to work. And Mr. Bell came in early and pled guilty to this offense.

THE COURT: For which he has been given three downward points.

MR. NEWMAN: I understand that, Your Honor. But what we're asking for -- and we're not asking for an unsubstantial sentence. That 188 months is roughly 22 years. Where the

range -- I should say to 235, it goes up to 25 years -- is more than substantial to adequately protect society and also to act as a deterrent and rehabilitation such as it is within the Bureau of Prisons to date.

But it should be noted, Your Honor, that Mr. Bell has succeeded at least in his prior prison sentence in deridding himself of a substantial drug habit that he's had. If Your Honor looks at his record, it goes back to when he was a teenager in the 1960s. And unless the court has any other questions....

THE COURT: I don't think I do, but thank you, Mr. Newman.

Mr. Brown, I think you heard what I said before about my inclination. Do you feel any compelling need to add to what you've said in your papers?

MR. BROWN: No, Your Honor.

THE COURT: Okay. Thank you.

Mr. Bell, you have a right, as did Mr. Day, to speak to me. Please feel free to tell me anything that you want me to take into account.

THE DEFENDANT: I have nothing to say, Your Honor.

THE COURT: All right. I respectfully decline to depart from the guidelines and I also decline to deviate from the probation office recommendation. I am going to sentence Mr. Bell to the high end of the guideline range. And for the

record, the reasons are that I think that at the age of 47 the lessons of the past still have not been learned.

This is a man who has an extremely extensive criminal record. This offense was extremely serious. The factors that counsel have pointed to in an admirable effort to do the best he can for his client are unpersuasive. The mental considerations I already addressed.

I do find and Mr. Newman was professional enough to acknowledge that if there's no clear basis to dispute or reject the calculation as to what happened in the aggregated sentence, then there is a basis to incorporate the prior '75 offense as a predicate felony for purposes of career offender status. I don't find that there's any basis to question what apparently is in the records of the MDC.

I think that the circumstances of this offense, the nature of the offense, the defendant's previous history, especially his criminal history all warrant sentencing at the upward end of the guidelines. So for those reasons here's the sentence.

All fines are waived as it is found that the defendant does not have the ability to pay a fine. It is ordered that the defendant shall pay to the United States a special assessment of $200 which is due immediately to the clerk of the court.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court that Bruce Bell is hereby committed on

Counts 2 and 3 of the indictment to the custody of the Bureau of Prisons to be imprisoned for a term of 319 months. This term consists of 235 months on Count 2 and 84 months on Count 3 which shall be served consecutively to the term on Count 2.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years. This term consists of five years on Counts 2 and 3 with all such terms of supervised release to be served concurrently and under these terms and conditions.

First, the defendant shall comply with the rules and regulations of the U.S. Probation Office and General Order 318.

Second, the defendant shall participate in outpatient substance abuse treatment and submit to drug and alcohol testing as instructed by the probation officer. The defendant shall abstain from using elicit drugs, alcohol and abusing prescription medications during the period of supervision.

Third, during the period of community supervision, the defendant shall pay the special assessment in accordance with this judgment's order pertaining to such payment.

Fourth, the defendant shall not obtain or possess any driver's license, social security number, birth certificate, passport or any other form of identification without the prior written approval of the probation officer. Further, the defendant shall not use for any purpose or any manner any name other than his true legal name.

Mr. Bell, you may appeal the sentence. To do so you to need to file a notice of appeal within ten days. Please speak to Mr. Newman about that. He will be available to represent you. If you cannot afford to have a lawyer for purposes of appeal, he can be made available to serve as your attorney.

Is there a motion concerning Count 1?

MR. BROWN: Yes, Your Honor. The government moves to dismiss Count 1.

THE COURT: Okay. That motion, in the interest of justice will be granted.

Is there anything further, counsel?

MR. NEWMAN: No, Your Honor.

THE COURT: Mr. Brown?

MR. BROWN: Nothing, Your Honor.

THE COURT: All right. Thank you, counsel.

(PROCEEDINGS ADJOURNED)

C E R T I F I C A T E

I HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT OF THE ABOVE-ENTITLED PROCEEDINGS, PAGES 1-56. DATED JANUARY 10, 2000; LOS ANGELES, CALIFORNIA.

Lynne Smith

LYNNE SMITH
OFFICIAL COURT REPORTER